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No. 08-63

IN THE

Supreme Court of the United States

NATIONAL MINING ASSOCIATION,

Petitioner,

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF ON BEHALF OF THE AMERICAN PETROLEUM INSTITUTE, THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AND THE INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER

The American Petroleum Institute ("API") has received the written consent of all parties to file this *amicus curiae* brief. After API had already received consent to file this brief, the Independent Petroleum Association of America and the Independent Petroleum Association of Mountain States ("*Amici*") agreed to join with API in support of the arguments presented. However, the additional *Amici* did not have the opportunity under S. Ct. R. 37.2(a) to seek consent from the parties. *Amici* therefore move pursuant to S. Ct. R. 37.2(b) for leave to join API in filing this *amicus curiae* brief in support of the petition for writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals").

As more fully explained at pages 1-2 of the attached brief under "Interests of *Amici Curiae*," *Amici* are trade associations that, like API, represent domestic oil and gas producers. And like API's members, *Amici's* members will suffer from the burden imposed by the Office of Surface Mining's definition of the phrase "Valid Existing Rights," set forth in 30 C.F.R. § 761.5 and affirmed by the Court of Appeals, if that definition is allowed to stand.

Accordingly, *Amici* respectfully request that the Court grant *Amici* leave to file the attached brief.

Respectfully submitted,

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The American Petroleum Institute, the Independent Petroleum Association of America, and the Independent Petroleum Association of Mountain States respectfully submit this brief as *amici curiae* in support of petitioner.[1]

INTERESTS OF *AMICI CURIAE*

Amici concur in the arguments advanced by the National Mining Association ("NMA") in its Petition for a Writ of *Certiorari* filed with the Court on July 14, 2008 ("NMA Petition"), and proffer the following, additional reasons why it is important that the Court grant the NMA Petition.

The American Petroleum Institute is a nationwide, non-profit, trade association headquartered in Washington, D.C. that represents over 400 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, transportation, refining and marketing.

The Independent Petroleum Association of America represents the thousands of independent oil and natural

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its members, or counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief by the American Petroleum Institute, and have been given at least 10 days notice of such filing. Those consents are being lodged herewith. Unfortunately there was not enough time to obtain the consents with respect to the other two amici.

gas producers and service companies across the United States. IPAA is a national trade association headquartered in Washington, D.C. that serves as an informed voice for the exploration and production segment of the industry.

The Independent Petroleum Association of Mountain States, founded in 1974, is a non-profit trade association representing more than 400 independent oil and natural gas producers, service and supply companies, banking and financial institutions and industry consultants committed to environmentally responsible oil and natural gas development in the Intermountain West.

Amici represent all segments of the domestic oil and gas industry, from the largest integrated companies to the smallest independent oil and gas producers. *Amici's* members are unified in their concern regarding the decision of the Court of Appeals finding no error in the interpretation of the phrase "valid existing rights" ("VER") adopted by the United States Department of the Interior's ("DOI") Office of Surface Mining ("OSM"). That interpretation is dramatically inconsistent with long-standing principles governing the property rights of lessees on public lands.

SUMMARY OF ARGUMENT

The D.C. Circuit wrongly allowed DOI's novel and insupportable interpretation of VER, which engrafts an "all permits" requirement onto the well-established application of VER in withdrawal situations, to stand. If left uncorrected, that ruling threatens pre-existing

property rights and upsets the delicate balance between competing interests in resources on federal lands. Moreover, it provides precedent for DOI to apply a similarly insupportable interpretation to other withdrawals of federally-managed lands, and could therefore seriously disrupt what to this point had been the settled right and expectation to develop a federal oil and gas lease once it is issued by DOI. DOI's interpretation would thus threaten the value of such leases and may deter investment by the domestic oil and gas industry in production onshore and on the Outer Continental Shelf ("OCS"), an unacceptable outcome given today's prevalent energy challenges.

I.

A. The D.C. Circuit's ruling upsets the balance between the use and conservation of resources on federal lands achieved through the well-accepted application of VER prior to DOI's interpretation. Congress has declared the development of federally-managed onshore and offshore oil and gas resources to be a national priority. Property rights to develop oil and gas resources accrue to a leaseholder upon issuance of the lease; yet, due to both regulatory and economic factors, it often takes substantial time and financial resources to commence production. Secure in these property rights, *amici*'s members, who hold large numbers of leases, have invested billions of dollars over many years to secure and develop these leases.

B. Other demands on federal lands must be balanced against resource development. These competing uses include recreation, wilderness, and

conservation. Acting pursuant to various authorities, Congress and the Executive accordingly may designate and withdraw areas from leasing or development.

C. VER serves as the essential tool preserving the balance between these competing demands. By regularly including VER provisions in over 100 federal laws, Congress recognizes that, despite its plenary authority over the use and disposition of federal lands and interests therein, preexisting property rights in federal oil and gas leases in a withdrawn area must be respected. VER provisions instill confidence in existing and prospective domestic oil and gas producers that future withdrawals will not upset their considerable investment or require expensive takings litigation.

II.

Given the importance of VER, future withdrawals coupled with compromised VER provisions would strip the rights of federal lessees and, consequently, may deter important future investment in domestic oil and gas resources on federal lands. DOI's VER interpretation, which superimposes a requirement that a producer not only holds a valid lease but also has obtained all necessary permits prior to withdrawal of the area from further mineral leasing and development, unfortunately achieves precisely this result. An oil and gas lessee may spend billions of dollars on bonuses, rentals and exploration costs before it is even in a position to apply for its development permits. And, given the need for exploration and planning, the lessee will not be able to submit that permit application until many years after the lease is issued.

Under DOI's VER interpretation, during the multi-year window between leasing and receipt of permits, every federal oil and gas lessee would face the threat of unilateral cancellation by the government of leases in which it has invested potentially billions of dollars. DOI's VER interpretation ignores the considerable time required to obtain permits after a lease is issued and jeopardizes a lessee's property rights until production is feasible and imminent. Though DOI's VER interpretation at this point applies only to coal mining under the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1272(e), DOI could seek to extend similar VER interpretations in the future to analogous federal land contexts.

III.

Because DOI's VER interpretation threatens to take lessees' development rights, it also may diminish existing and future lessees' incentive to invest in domestic resources on federal lands and ultimately may result in decreased domestic production. Such deterrence is particularly troubling given the already restricted opportunities for domestic production and the national debate surrounding the opening of new areas to leasing. In a time of pervasive energy challenges nationwide, DOI's VER interpretation would have the undesirable effect of making federally-managed resources even less attractive.

IV.

DOI's VER interpretation deserves no deference because it conflicts with contemporaneous interpretations of VER at the highest agency level. Indeed, concurrent with OSM's rulemaking setting out its "all permits" requirement, the DOI Solicitor published a formal opinion, concurred in by the Secretary and binding on OSM, concluding that property rights embodied in a valid mining claim could alone establish VER without any permit requirement. In such circumstances, DOI's contrary VER interpretation is unreasonable and the D.C. Circuit was wrong to defer.

ARGUMENT

THE COURT'S REVIEW IS NECESSARY BECAUSE THE DEPARTMENT OF THE INTERIOR'S "VER" INTERPRETATION COULD THREATEN THE CONTINUED VIABILITY OF FEDERAL OIL AND GAS DEVELOPMENT

Prior to DOI's 1999 interpretation of VER, it was generally recognized that the holder of a property right to develop minerals on federally-administered land, whether through a federal oil and gas lease,[2] a federal coal lease,[3] or a valid mining claim,[4] was protected from

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[2] *Union Oil Co. of California v. Morton*, 512 F.2d 743, 750-51 (9th Cir. 1975).

[3] *NRDC v. Berklund*, 609 F.2d 553, 559 (D.C. Cir. 1980).

[4] *Wilbur v. United States ex rel. Krushnik*, 280 U.S. 306, 316-17 (1930); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335-37 (1963).

the effects of future regulatory actions withdrawing that area from mineral development. The Court of Appeals, however, affirmed DOI's interpretation of VER as requiring not only the existence of a property interest but also that the holder acquire or reasonably attempt to acquire requisite permits necessary for production. The oil and gas industry is concerned that this "VER Plus" definition, if left unchecked, is clear precedent that may be applied to existing and future VER provisions that affect federal oil and gas leases. This real possibility seriously threatens the value of federal oil and gas leases and could deter the domestic oil and gas industry from investing in oil and gas production onshore and on the OCS.

Adverse impacts to this Nation's oil and gas production capability could not come at a worse time. Our Nation faces historically-high energy prices. Restrictions on leasing that defy existing property rights and put significant volumes of our oil and gas resources off-limits challenge our economic stability and threaten our national security.

I. VER HAS TRADITIONALLY SERVED AS THE LINCHPIN BALANCING PRE-EXISTING EXPLORATION AND DEVELOPMENT RIGHTS AND FUTURE CONSERVATION INTERESTS ON PUBLIC LANDS

A. FEDERAL OIL AND GAS LEASE EXPLORATION AND DEVELOPMENT IS A COSTLY AND HIGHLY REGULATED PROCESS

Development of federally-managed oil and gas resources is an important national policy. 43 U.S.C. § 1701(a)(12) ("The Congress declares that it is the policy of the United States that . . . the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals . . ."); 43 U.S.C. § 1332(3) ("[T]he outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development . . ."). *Amici's* members hold property rights in large numbers of oil and gas leases on federal lands onshore and on the OCS issued under various mineral leasing laws administered by DOI.[5] As of 2007, there were well in excess of 28,000 producing federal oil and gas leases.[6]

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[5] The principal mineral leasing laws for oil and gas include the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.* ("OCSLA"); the Mineral Leasing Act ("MLA"), 30 U.S.C. §§ 181 *et seq.*; and the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351 *et seq.*

[6] *See* Minerals Mgmt. Serv. ("MMS"), *2001-Forward MRM Statistical Information*, http://www.mrm.mms.gov/MRMWebStats/Home.aspx (last visited Aug. 11, 2008).

Oil and gas production from onshore and offshore federal lands is particularly vital to our Nation's economic well-being, accounting for 35% of domestic oil production and 30% of domestic natural gas production as of 2006.[7]

Federal oil and gas leases are issued with a primary term generally ranging from five to ten years. *See, e.g.*, 30 C.F.R. § 256.37 (stating that initial term of oil and gas leases on the OCS shall be for five years and cannot exceed ten years). Thereafter, the leaseholder retains lease rights as long as there is production from the lease in paying quantities. *Id.* Property rights are conferred upon lease issuance, *see* Jan G. Laitos, *The Nature & Consequence of "Valid Existing Rights" Status in Public Land Law*, 5 J. MIN. L. & POL'Y 399, 416 (1989) [hereinafter Laitos, *The Nature & Consequence of "Valid Existing Rights"*], but it generally takes years of diligent effort and significant investment to obtain the requisite permits and approvals to bring a lease into production, particularly on the OCS. *See, e.g.*, Minerals Management Service ("MMS"), OCS Report, MMS 2008-013, *Deepwater Gulf of Mexico 2008: America's Offshore Energy Future* 76-77 (2008) ("MMS Report").[8] During those years, the leaseholder

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[7] Energy Info. Admin., *Oil and Natural Gas Market Supply and Renewable Portfolio Standard Impacts of Selected Provisions of H.R. 3221* (Dec. 2007), http://www.eia.doe.gov/oiaf/servicerpt/bmy/index.html (last visited Aug. 11, 2008).

[8] *Available at* http://www.gomr.mms.gov/PDFs/2008/2008-013.pdf (last visited Aug. 11, 2008); *see also* American Petroleum Inst., *OCS Moratoria Fact Sheet*, http://www.energytomorrow.org/energy/OCS_Moratoria_ Fact_Sheet.aspx (last visited Aug. 11, 2008).

may spend billions of dollars for exploration and development of its lease on top of the millions of dollars that may have been paid in bonus bids to secure the lease in the first place. *Id.* Costs to develop in the deepwater OCS, likely the best prospect for future development, are particularly staggering. MMS Report at 14. All of this investment is made in good faith reliance on those property rights received under the lease contract.

Compounding the enormity of the costs sunk into development is the fact that it will take years, if ever, for a lessee to see a return on its investment. This is especially true offshore, where production may not occur for as many as ten years depending on the complexity of the engineering challenges, including water and drilling depths and the geological characteristics of the reservoir, that lessees must overcome in developing their leases. *Id.* at 14, 76-77. In addition, lessees seeking to develop their offshore leases face a burdensome, multi-step permitting process. *Id.* at 39. For example, before drilling can even begin, MMS must first approve a highly-technical Exploration Plan that involves an extensive review of geological, geophysical and engineering data, all of which must be developed by the lessee. 30 C.F.R. § 250.201. Further, before the lessee may begin production, MMS must approve a Development and Production Plan or Development Operations Coordination Document, another highly-technical document. *Id.* Of course, an oil and gas lessee must obtain a variety of other permits to satisfy its obligations under other environmental statutes before production may begin. *See* 30 C.F.R. § 250.281.

B. FEDERAL LANDS ARE SUBJECT TO COMPETING RESOURCE DEMANDS AND MAY BE WITHDRAWN FROM FURTHER DEVELOPMENT

The need to develop our Nation's federally-managed mineral resources is always balanced against competing resource values. *See, e.g.*, 43 U.S.C. § 1701(a)(8) (declaring that it is the policy of Congress, *inter alia*, that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values"). In addition to their substantial mineral resource values, our Nation's federal lands often are visually unique and have value for purposes including recreation, wilderness, archeological resources, and other uses. The significance of these other resource values regularly subjects these lands to consideration by Congress, the President, or the Secretary of the Interior for mixed uses, including withdrawal from further mineral development. Similarly, our coastal states have resources important to uses such as tourism and recreational opportunities. In consideration of these coastal resources and other concerns, Congress and the President likewise may withdraw areas of the OCS from leasing and development.

Various authorities are available to Congress and the Executive to achieve that purpose. Through the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, Congress has plenary authority over disposition of federal lands and resources. Well over 100 statutes have authorized withdrawal of lands from application of the mineral leasing laws and other mineral disposition statutes.

See Appendix E to NMA Petition ("NMA Appendix E"). Congress uses this authority to designate national parks, wildlife refuges, recreation areas, and wilderness areas (to name but a few), precluding new leasing and development of oil and gas in these designated areas. For the past 27 years, Congress also has imposed an annual moratorium on oil and gas leasing for most areas of the OCS except the Central and Western portions of the Gulf of Mexico, small portions of the Eastern Gulf of Mexico, and certain areas offshore of Alaska. *See, e.g.*, Appropriations Act of Dec. 23, 1981, Pub. L. No. 97-100, 95 Stat. 1399 (Dec. 23, 1981) (the first appropriations bill to contain the moratorium on leasing).

Congress also has delegated certain withdrawal authority to the Executive Branch. Recently, Presidents Bush and Clinton have utilized the authority granted by the Antiquities Act, 16 U.S.C. §§ 431 *et seq.*, to withdraw lands in Hawaii[9] and Utah,[10] respectively. Similarly, OCSLA authorizes the President to withdraw areas of the OCS from consideration for leasing. 43 U.S.C. § 1341(a). The Secretary of the Interior also has authority to withdraw lands from disposition. Under the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431 *et seq.*, the Secretary may designate marine sanctuaries as areas off-limits to mineral development. The Secretary also may temporarily withdraw lands from

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[9] Establishment of the Northwestern Hawaiian Islands Marine National Monument, Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 26, 2006).

[10] Establishment of the Grand Staircase-Escalante National Monument, Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 24, 1996).

further mineral development while Congress considers a permanent withdrawal. *See, e.g.*, 16 U.S.C. § 3213; 43 U.S.C. § 1714(c).

C. VER IS THE LEGAL "GLUE" THAT PRESERVES THE RIGHTS OF PUBLIC AND PRIVATE PROPERTY HOLDERS BY BALANCING COMPETING INTERESTS IN PUBLIC LANDS

Obviously, if Congress or the Executive directly extinguished pre-existing federal oil and gas lease rights in an area for which it is implementing a withdrawal, the existing property-right holders would have an action against the government for breach of contract and unlawful taking in violation of the Fifth Amendment to the United States Constitution. *See Mobil Oil Exploration & Producing S.E., Inc. v. United States*, 530 U.S. 604, 607 (2000); *United States v. Winstar Corp.*, 518 U.S. 839, 843 (1996); *Union Oil*, 512 F.2d at 750-51. To avoid that legal consequence, Congress or the President typically includes a provision that protects VER. *See, e.g.*, Wilderness Act of 1964, 16 U.S.C. § 1133(d)(3); Establishment of the Grand Staircase-Escalante National Monument, Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,225 (Sept. 24, 1996) ("The establishment of this monument is subject to valid existing rights."); *see also* NMA Appendix E. Such provisions embody the well-understood concept that persons who hold existing mineral leases and property rights in newly protected areas have the right to continue to enjoy those property rights (although development may become more difficult as a consequence of the withdrawal). *See* NMA Petition at 8-9 n.16.

VER preserves a delicate and important balance in federal property law that has developed over many years. The various statutory VER provisions reflect Congress' recognition that, while it has plenary authority over the use and disposition of federal lands and interests in land, and therefore may remove or withdraw those lands from use or disposition for mineral development or any other purpose, there likewise is a requirement to respect pre-existing private interests in those federal lands and resources at the time of withdrawal.

If Congress did not regularly include VER provisions in federal statutes that withdraw lands from previously acceptable mineral disposition and other uses, few, if any, would invest in developing federal resources because of the very real prospect that, at any time, Congress may render their efforts effectively worthless. At best, the affected rights holders would face years of litigation to recover their prior investment from the government through an action for a taking or breach of contract. VER is the "glue" that holds this delicate balance together — Congress or the Executive may withdraw lands and resources from previously acceptable uses, but those who made investments in those resources prior to withdrawal are entitled to retain the benefit of their efforts.

II. "VER PLUS" UPSETS THE BALANCE BETWEEN USE AND CONSERVATION OF RESOURCES

DOI's VER Plus interpretation of SMCRA departs dramatically from the well-recognized application of VER in withdrawal situations. VER provisions generally require only the demonstration of a valid property right to produce minerals that pre-dates the withdrawal. Laitos, *The Nature & Consequence of "Valid Existing Rights"* at 425. DOI's VER Plus, however, requires not only the demonstration of a valid property right but also demonstration of a lessee's satisfaction of additional conditions (*i.e.*, all permits required to begin production have been obtained or applied for). *See* 30 C.F.R. § 761.5.

There is no reasoned basis to distinguish the property interest granted under a federal coal lease subject to DOI's VER Plus interpretation from the property interest granted under a federal oil and gas lease. Federal coal leases are issued under the same leasing statute as onshore oil and gas leases. *Compare* 30 U.S.C. § 201 (coal) *with* 30 U.S.C. § 226 (oil and gas onshore). Therefore, under the Court of Appeals' decision, nothing would prevent DOI from applying VER Plus in the onshore oil and gas context should the area where the lease is located be withdrawn from further development by a post-lease statute or Executive action. Further, because the leasing regime for offshore leases under OCSLA, 43 U.S.C. § 1337, is the same as under the MLA, *see Fina Oil & Chem. Co. v. Norton*, 332 F.3d 672, 673 (D.C. Cir. 2003), the same concern applies for offshore leases.

If VER Plus were applied to the federal oil and gas leasing regime, the delicate balance between use and conservation of resources would falter. A federal oil and gas lease grants the leaseholder the right to develop mineral resources thereunder without unreasonable restriction. *See, e.g., S. Utah Wilderness Alliance*, 159 IBLA 220, 240-41 (2003). DOI's VER Plus standard alters that important legal principle by limiting that development right only to situations where the lessee effectively is ready to commence production because it has obtained all permits or made a good faith effort to do so. Until such time, *the functional effect of the DOI regulation is that the lessee's rights under its lease are subject to unilateral termination by the government.* Because it may take years from the time a lease is issued to obtain the requisite regulatory approvals and permits to begin production from a federal oil and gas lease, particularly on the OCS, the lessee risks losing its property rights and substantial investment any time before it begins production.

This is particularly problematic where either the MMS or the Bureau of Land Management ("BLM") has directed a suspension of a federal lease, *see* 30 C.F.R. §§ 250.168 - 250.177 (MMS); 43 C.F.R. § 3103.4-4 (BLM), during which time the lessee is prevented from conducting those activities on the lease necessary to obtain requisite permits. Because these suspensions frequently remain in effect for years, *see California v. Norton*, 311 F.3d 1162, 1173 n.6 (9th Cir. 2002), during that entire time the lessee would be at risk of losing its lease if Congress subsequently withdrew the area from mineral disposition. VER Plus exacerbates that risk.

III. "VER PLUS" DISRUPTS EXISTING PROPERTY RIGHTS AND MAY RESULT IN REDUCED OIL AND GAS PRODUCTION FROM FEDERAL LEASES

Investing in domestic exploration and development has historically been attractive to the oil and gas industry because of the certainty of the property rights granted under federal mineral leases. If that certainty no longer exists, domestic oil and gas companies will likely be less willing to pay tens of millions of dollars in bonus bids for oil and gas leases if the Federal Government later may declare the area off-limits and leave the lessee with a non-producible lease if it has not yet acquired all the requisite permits to begin production. This new threat — that a lease does not provide a secure right to produce — will be most acutely felt in those areas with a significant risk of withdrawal.

For example, millions of acres of the OCS currently are unavailable for leasing and development pursuant to a moratorium that has been renewed annually for the past 27 years. *See, e.g.*, Pub. L. No. 97-100 (Dec. 23, 1981). In 2006, some of the areas of the Eastern Gulf of Mexico previously subject to the moratorium were made available for leasing as a consequence of the Gulf of Mexico Energy Security Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (Dec. 20, 2006) ("GOMESA"). Lease sales were held pursuant to GOMESA in October 2007 and March 2008, resulting in bonus bids in the tens of millions of dollars and another lease sale is anticipated in 2009.[11] Moreover, today, as a consequence of

[11] *See* http://www.mms.gov/offshore/gomesa/gomesa.htm (last visited Aug. 11, 2008).

historically-high oil prices, Congress is embroiled in a heated debate over opening additional areas of the Eastern Gulf of Mexico and Atlantic OCS to leasing and development.[12] Lifting the moratorium even has become an important issue in the presidential campaign, as both major-party candidates have expressed support for increased offshore development.[13]

Opening new areas to leasing is equally controversial onshore. Most recent federal onshore oil and gas lease sales held by the BLM have been challenged. *See, e.g., S. Utah Wilderness Alliance v. U.S. DOI*, 2007 U.S. Dist. LEXIS 55562 at *4-5 (D. Utah July 30, 2007) (Kimball, J.). Issues include concerns about impacts of development on wildlife, air quality, and archeological resources as well as on areas that are considered by some to be of wilderness quality. *See, e.g., S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253 (D. Utah 2006). The debate is more animated when BLM seeks to offer new areas that were not extensively leased, like Colorado's Roan Plateau.[14] For the most part, BLM

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[12] *See, e.g.*, Steven Lee Myers & Carl Hulse, *Bush Lifts Drilling Moratorium, Prodding Congress*, N.Y. TIMES, July 14, 2008, *available at* http://www.nytimes.com/2008/07/14/washington/14drillcnd.html?_r= 2&sq=Drilling%20 Moratorium&st=cse&adxnnl=1&oref=slogin&scp=1&adxnnlx=1218560935-m58a960jOgjprPxNZT3aAQ (last visited Aug. 11, 2008).

[13] *See, e.g.*, Larry Rohter, *Obama, in New Stand, Proposes Use of Oil Reserve*, N.Y. TIMES, Aug. 5, 2008 at A14.

[14] *See, e.g.*, Press Release, *More than 17,000 Protest BLM Decision to Lease the Roan Plateau, available at* http://www.saveroanplateau.org (last visited Aug. 11, 2008).

has proceeded to issue leases in these controversial areas, but some in Congress have sought to place certain of these areas off limits to development.[15]

Opening federally-managed lands onshore and offshore to new or expanded oil and gas development is critical to the vitality of the domestic oil and gas industry, but the process is continually scrutinized. While Congress and BLM have recently pursued leasing certain new areas offshore and onshore, Congress or the Executive could withdraw controversial areas from further leasing and development, subject to VER. If this were to occur and VER Plus were to apply to existing oil and gas lessees who have expended billions of dollars on bonuses, rentals, and exploration costs, they will not be able to proceed with developing their leases if they have not, in addition to possessing valid property rights in the form of oil and gas leases, satisfied the additional conditions imported by DOI, which in this case would be obtaining all their permits.

If the ruling below stands, future BLM- and MMS-sponsored lease sales could be significantly impacted. If potential lessees should participate, they will risk less money in bonus bids. The Federal Government thus could receive fewer bids for leases and less revenue from bonus bids because of legal uncertainties regarding the sanctity of property rights conveyed by the lease. Companies could divert more revenue to exploration and development outside the United States, ultimately

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[15] *See, e.g.*, http://www.markudall.com/page/s/SaveTheRoan (last visited Aug. 11, 2008).

decreasing domestic reserves and increasing dependence on foreign and less secure sources of supply. In short, the risk that DOI could impose its VER Plus interpretation on federal oil and gas leases will undeniably make federally-managed lands less attractive for oil and gas development, resulting in a possible reduction in federal revenues and in domestic production from federal lands.

"VER PLUS" IS UNREASONABLE AND NOT ENTITLED TO DEFERENCE BECAUSE IT CONFLICTS WITH THE SECRETARY OF THE INTERIOR'S CONTEMPORANEOUS APPLICATION OF VER TO FEDERAL MINERALS

Coal, hard-rock minerals (*e.g.*, gold, silver, and copper), and oil and gas are the three most significant mineral regimes on federal lands. Between 1997 and 1999, OSM went through a rulemaking and adopted VER Plus for coal. In the midst of the rulemaking process, the Solicitor of the Department of the Interior ("Solicitor"), who is the chief legal officer for all DOI bureaus (including OSM), issued a formal opinion addressing VER in the hard-rock mining context. He reached a conclusion consistent with the prevailing definition of VER rather than VER Plus. This conflicting and binding Opinion demonstrates that OSM's interpretation is arbitrary and capricious and not entitled to deference as a legal matter, justifying this Court's grant of *certiorari* to review the decision below. Moreover, inconsistency in the administrative interpretation of the same legal concept in two regimes creates great uncertainty as to which interpretation

DOI will apply to the third mineral regime, oil and gas, calling into question the sanctity of existing property rights.

I. THE 1998 SOLICITOR'S OPINION RECOGNIZES EXISTING PROPERTY RIGHTS

In a formal published opinion, "Patenting of Mining Claims and Mill Sites in Wilderness Areas," M-36994 (May 22, 1998) ("Solicitor's Opinion"), concurred in by the Secretary of the Interior, the Solicitor addressed the rights of certain holders of mining claims located pursuant to the Mining Law of 1872, 30 U.S.C. §§ 21 *et seq.*, in areas within the National Wilderness Preservation System[16] withdrawn from further mineral entry and leasing under the Wilderness Act, 16 U.S.C. § 1133(d)(3). The Wilderness Act was enacted in 1964, but allowed for continued location of mining claims, and issuance of federal mineral leases, until December 31, 1983. It then provides:

> Subject to valid rights then existing, effective January 1, 1984, the minerals in lands designated in this Act as wilderness areas are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto.

Id. Thus, for covered areas, the Wilderness Act allowed the location of mining claims under the Mining Law of

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[16] Areas within the National Wilderness Preservation System are also expressly included in SMCRA § 522(e).

1872, and issuance of federal leases for oil and gas, coal and other minerals pursuant to the Mineral Leasing Act, 30 U.S.C. §§ 181 *et seq.*, until December 31, 1983. Thereafter, subject to "valid rights then existing," further mineral dispositions were prohibited.

The Solicitor's Opinion addressed whether, under a different provision of 16 U.S.C. § 1133(d)(3)[17] that specifically addressed valid existing rights to a patent,[18]

> claims where the claimant properly located a mining claim and made a discovery of a valuable mineral deposit before the land in question was designated as wilderness, but for which the claimant had not established a right to a patent before the land was designated as wilderness . . . should be patented without a reservation of the surface estate.

Solicitor's Opinion at 4-5. In analyzing this issue, the Solicitor reviewed all the VER provisions within § 1133(d)(3), including the provision quoted above. The Solicitor opined: "[i]n short, nothing in the language of section 4(d)(3) . . . affects a claimant's ability to continue

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[17] "[A]nd hereafter, subject to valid existing rights, all patents issued under the mining laws of the United States affecting national forest lands designated by this Act as wilderness areas [including BLM lands, *see* Solicitor's Opinion at 2 n.4] shall convey title to the mineral deposits within the claim . . ."

[18] The Mining Law, 30 U.S.C. § 29, provides the procedure by which a mining claimant may apply for a patent, *i.e.*, fee title to a validly located claim.

to develop the valuable minerals on a preexisting unpatented mining claim, so long as a valid claim had been established as of the time the land was withdrawn from further appropriation under the mining laws." *Id.* at 8.

This conclusion reached by DOI's chief legal officer and the Secretary in 1998, in the midst of the rulemaking adopting the VER Plus interpretation, diverges 180 degrees from OSM's unique permits-plus interpretation. While OSM interprets VER as requiring more than just the legal entitlement to mine, the Solicitor and the Secretary concluded that the existence of property rights embodied in a valid mining claim alone was adequate to establish VER, thereby protecting those rights from the consequences of a later withdrawal of the affected lands. OSM's departure from the latter, accepted VER interpretation would be further pronounced if applied to withdrawals from oil and gas development given that vested property rights even more clearly predominate in the leasing context. *See* Laitos, *The Nature & Consequence of "Valid Existing Rights"* at 416-17.

II. OSM'S INTERPRETATION IS NOT ENTITLED TO *CHEVRON* DEFERENCE BECAUSE OF DOI'S ARBITRARY AND CAPRICIOUS, CONFLICTING INTERPRETATIONS OF VER

While an agency's construction of the laws it is charged to implement is entitled to substantial deference, *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991), the agency's interpretation must not be arbitrary or capricious,

Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984). Here, the D.C. Circuit did not find OSM's interpretation to be unlawful, even though it had changed its interpretation over the years since SMCRA's passage, with OSM ultimately concluding that VER must be limited by the all permits-plus standard. 512 F.3d 702, 712 (D.C. Cir. 2008).

DOI policy states that the Solicitor's formal legal opinions, or "M-Opinions," are "binding on all other Departmental offices and officials and . . . may be overruled or modified only by the Solicitor, the Deputy Secretary, or the Secretary." DOI Departmental Manual, Part 209, Chapter 3.2A(11) (209 DM 3.2A(11)).[19] The Acting Assistant Secretary of the Department of the Interior, who signed the Final Rule establishing VER Plus, does not qualify as an agency official entitled to depart from or otherwise alter the Solicitor's Opinion. OSM's interpretation is therefore entitled to no deference. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-47, n.30 (1987) (rejecting agency interpretation of statute on ground that interpretation was not consistent with congressional intent, and finding agency's interpretation was not entitled to heightened deference because it had been inconsistent over time).

OSM sought to justify its cramped interpretation of VER by relying on Congress' interest in protecting

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[19] *See* http://elips.doi.gov/app_home/index.cfm?f useaction =home (last visited Aug. 11, 2008). This policy was recently reaffirmed in a 2001 agency Memorandum, issued by the same Solicitor responsible for the 1998 Solicitor's Opinion described above. "Binding Nature of Solicitor's M-Opinions on the Office of Hearings and Appeals" (Jan. 18, 2001).

sensitive areas, like national parks and wildlife refuges, from the impacts of surface mining. *See, e.g.*, Valid Existing Rights, Final Rule, 64 Fed. Reg. 70,766 (Dec. 17, 1999)

> Congress did not define VER, and the legislative history of section 522(e) emphasizes that, with certain exceptions, Congress intended to prohibit new surface coal mining operations on the lands listed in that section. . . . We believe that these facts argue against adoption of a rule that defines VER solely in terms of property rights.

In OSM's view, the concept of VER may be limited when the resources that Congress is seeking to protect have particularly significant values to the public. However, OSM's attempt at this distinction fails. The Solicitor's Opinion addressed VER in the National Wilderness Preservation System — the very same federal lands included within the scope of the protections provided under SMCRA § 522(e) — and provides no basis to diverge from the standard interpretation of VER.

III. INCONSISTENT DOI OPINIONS REGARDING VER UPSET THE DELICATE BALANCE BETWEEN DEVELOPMENT AND CONSERVATION

That OSM and the Solicitor, within a year, could reach such divergent opinions about the scope of VER demonstrates the fallacies of the D.C. Circuit's opinion subject to the pending petition for *certiorari*. The long-standing VER policy of the Department of the Interior

acts as the "glue" that preserves the balance between the competing interests of protecting pre-existing property rights in the development of minerals on public lands and preserving interests in conservation of the same lands. Allowing the agency to subject the VER standard to dramatically different interpretations threatens the core of oil and gas exploration on federal lands. The Supreme Court should grant *certiorari* in this matter to prevent the D.C. Circuit's decision from dissolving that glue.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant NMA's petition for a writ of *certiorari*.

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